81-2273

NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RONALD CAMINITA,

Petitioner

versus

STATE OF LOUISIANA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Whether a superior may arbitrarily refuse to honor an offer of a plea bargain agreement made by a subordinate prosecutor with real or apparent authority, which was timely accepted by defendant, when such refusal implicates concepts of fundamental fairness protected by the Fourteenth Amendment's due process clause?

2. Whether such a refusal to honor an offer of a plea bargain also violates petitioner's right to effective assistance of counsel as protected by the Sixth Amendment?

PARTIES

Petitioner, Ronald Caminita, is a 17 year old resident of New Orleans, Louisiana, who was convicted of armed robbery of a fast food outlet in New Orleans.

Respondent, is the State of Louisiana.

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OPINIONS BELOW

The Opinion of the Supreme Court of Louisiana, not yet reported, appears in Appendix A-1 hereto. The Opinion of the Criminal District Court, Parish of Orleans, not published appears in Appendix A-2 hereto.

JURISDICTION

The Judgment of the Supreme Court of Louisiana was entered on March 1, 1982. Petitioner's Motion for Rehearing was denied on April 5, 1982. This petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

STATUTORY PROVISIONS INVOKED

United States Constitution, Amendment XIV, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Ronald Caminita, was arrested on October 21, 1979 at the home of his grandfather in Jefferson Parish, Louisiana. He was charged with the State crime of armed robbery of a retail fast food establishment. The appellant was tried and convicted on the 11th day of March 1980 by a jury and with the Honorable Rudolph F. Becker, III presiding.

Prior to this trial, on February 25, 1980 counsel for the petitioner met with Mr. David Plavinsky of the Orleans Parish District Attorney's office and Mr. Joe Meyers, Chief of Trials of the Orleans D.A. The meeting was by chance in a New Orleans restaurant, but because the two above-mentioned prosecutors were handling the Caminita case they raised the subject of that case to petitioner's counsel. The question of a plea bargain arose and all parties discussed a bargain to allow petitioner to plead guilty to a charge of simple robbery, which the prosecutors would recommend along with a fine and jail time. Attorney for petitioner accepted, pending a discussion with his client and believed that an agreement had been reached which would be finalized by prompt acceptance by his client. On the day following this meeting counsel for petitioner, after discussion with his client, attempted to finally accept the bargain by calling Mr. Meyers. After some delay in accepting counsel's calls Mr. Meyers communicated that the Orleans D.A. had rejected the agreement offered by Mr. Meyers and in effect failed to honor the plea agreement.

After the District Attorney formally refused to honor the agreement in open court, petitioner moved to quash, which motion after hearing, was denied. Petitioner was forced to trial, and the Louisiana Supreme Court refused Supervisory Writs on the plea question, finding instead adequate appellate remedies.

After conviction petitioner appealed the denial of the motion to quash along with the denial of a motion for new trial based upon a conviction contrary to the law and evidence. The Supreme Court of Louisiana affirmed the conviction.

While the record indicates some disagreement about the exact discussion that took place between counsel for petitioner and members of the District Attorney's office such disagreement is irrelevant. Both the district judge and the Supreme Court held that as a matter of law plea negotiations are not constitutionally protected, but only final plea agreements. (Appendix A-1 & A-2)

REASONS FOR GRANTING THE WRIT

I. The Rulings Below Conflict With Important Principles Articulated By This Court And Other Lower Courts.

Plea bargaining has become the mainstay of the American criminal justice system. Consequently, this Court has recently begun to legitimate, define and somewhat control the entire process, which it has called "an essential component of the administration of justice". *Santobello v. New York*, 404 U.S. 257, 260 (1971). *Santobello* also said that "the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, *must be attended by safeguards to insure the defendant what is reasonably due in the circumstances*". 404 U.S. at 262 (emphasis added). Proceeding from this principle, and grounding its decision upon constitutional concepts of "fairness" this court held that remedies would exist for unfulfilled prosecutorial promises even where the breach was "inadvertent", and despite the fact that the breach did not influence the judge on the subject matter of the agreement, *i. e.* sentencing.

The inexorable result of these *Santobello* principles was the analogy of plea bargaining to concepts of contract law. *See* Westin & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif.L.Rev. 471 (1978). Such analogies, however, have not always proved sufficient, and the important principles of *Santobello* are not adequately protected by mere contract analogies. This is especially true when the "breach" occurs *prior* to the consummation of the bargain, but at a stage and in a way that the fairness principles of *Santobello* are clearly implicated. *See Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979). *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1980); *Comm. of Pennsylvania v. Klobuchir*, 405 A.2d 881 (Penn. 1979); *State v. Johnson*, 596 P.2d 308 (Wash.App. 1979); and *Bullock v. State*, 397 N.E.2d 310 (Ind. 1979) (Shields, J., dissenting).

A. The Rulings Below Conflict With Due Process Principles Protecting The Plea Bargaining Process Through The Fourteenth Amendment.

The Fourth Circuit was the first to address the question of "breached" plea negotiations. That court drew upon *Santobello* to conclude that it must view such a "breach" in terms of constitutional fairness as protected by the Fifth (and Fourteenth) Amendment due process clause. The court did not reject the contract analogy, but only noted its limits and observed "that the temptation to take the relative certainties of established common law analogies too far in developing difficult constitutional doctrine is ever present and ever to be resisted". *Cooper v. United States*, 594 F.2d 12, 17 (4th Cir. 1979). See also, *Brewer v. Williams*, 430 U.S. 387, 401 N. 8 (1977); *Stoner v. California*, 376 U.S. 483, 488 (1964). *Silverman v. United States*, 365 U.S. 505, 513 (1961); and *Jones v. United States*, 362 U.S. 257, 266 (1960).

The *Cooper* court itself felt that the substantive due process right to fairness in the plea bargaining process was "too plain to require discussion". 594 F.2d at 18. The reason for this obviousness inheres in the constitutional nature of plea bargaining, as defined in *Santobello*, and in the vulnerable position in which a defendant finds himself once plea negotiations begin and he is at the whim of the prosecutor.

The application of fairness/due process concepts emanates from notions of human dignity, which require special treatment for human persons - - even criminal defendants. The preference for due process over contract in *Cooper* recognizes that human dignity is compromised when, at any stage of criminal proceedings, one's rights are relegated exclusively to contract theory. In plea bargaining it is liberty that is being negotiated, not goods and services. *Cooper* merely says that the constitutional mandate of fairness requires that plea offers be respectful of human dignity, and be made with the utmost of care, and must remain binding but for the most compelling of reasons.

Though this court has never faced this particular question its view of fundamental fairness is well stated and protected in the *Cooper* analysis, and consequently, ignored by the rulings below. But even more important is the reasonable and persuasive analysis that the *Cooper* court urges as a basis for establishing fundamental fairness in this context.

> In so holding, we emphasize those factual elements most crucial to our finding of right and violation in order to confine our holding as narrowly as we may for decision. Here the proposal was specific and unambiguous in form, and was made without any reservation related to a superior's approval or otherwise; its content was reasonable in con-

text; it was made by a prosecutor with apparent (and probably actual) authority at the time; it was communicated promptly to the defendant so that no question of staleness was involved; the defendant assented promptly and unequivocally to its terms, indicated his assent to his counsel, and was entitled so far as the record shows to assume that its communication to the government would consummate the plea agreement; defense counsel did in fact within a matter of a few hours communicate defendant's acceptance to the government, by sheer fortuity being told of the government's "withdrawal" before he could vocalize his client's "acceptance"; and finally, the reason for the attempted withdrawal had nothing to do with extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended, but lay simply in a superior's second-guessing of a subordinate's judgment. When, as here, such a proposal - - specific, unambiguous and not unreasonable on its face - - is offered by the government to a defendant through his counsel, constitutional fairness requires that it be fulfilled if within a reasonable time the defendant unequivocally communicates his assent to it, and unless in the interval extenuating circumstances affecting the propriety of the proposal that were unknown to and not reasonably discoverable by the government when the proposal was made have supervened or become known. This necessarily means that once presented, such a proposal may not be withdrawn in the face of proffered acceptance for no other

> reason than that a superior disagrees with an apparently authorized subordinate's judgment in making it. *Id.* at 19.

This analysis should be accepted by this Honorable Court, and if accepted, should require a reversal of the Louisiana Supreme Court ruling in that the instant facts would be shown to be extremely consistent with the *Cooper* facts.

B. The Rulings Below Conflict With The Decisions Of Other Federal and State Courts And A Determination By This Court Is Necessary To Insure Uniformity On This Important Constitutional Question.

The precise issue of this case is one that has received attention only since this Court's decision in *Santobello*, a relatively short time indeed. Consequently, not only has this Court not spoken to the issue, but neither have many other courts. Yet, among those whom have spoken there is great conflict and confusion, which cries out for uniformity.

Cooper, supra is of course the leading Federal circuit case on the subject. The Fourth Circuit has recently reaffirmed *Cooper in United States v. Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1980) and *United States v. McIntosh*, 612 F.2d 835 (4th Cir. 1979).

In *McIntosh* Judge Phillips elaborated upon the *Cooper* rationale in his concurrence:

> "Specifically, we held [in *Cooper*] that while constitutional right would ordinarily be found to have arisen at any point where right measured by contract law would be found, it might arise earlier. Without attempting a general definition of the point short of contract right where constitutional right arose,

> we held on the specific facts of that case such a right had arisen and must be enforced.
>
> . . . .
>
> Underlying and giving content to the constitutional right defined and enforced in *Cooper* are expectations reasonably induced by government that its proposals respecting the liberty of persons accused of a crime will be honored. 612 F.2d at 838 (Phillips, J., concurring).

On the other hand one Federal Circuit has rejected *Cooper* in *Gov't. of Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir. 1980). The Ninth Circuit has on two occasions specifically left open the question: *United States v. Scheufler*, 599 F.2d 893 (9th Cir. 1979) and *United States v. Herrera*, 640 F.2d 958 (9th Cir. 1981). The Tenth Circuit has on one occasion cited *Cooper* approvingly. *See United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981).

The confusion and conflict that has plagued the circuits on this question has been reflected in the lower federal courts, and the various state courts. However, despite the fact that two other courts have specifically left open the question, *See Gold v. Booth*, 433 N.Y.S.2d 879 (App.Div. 1980). and *United States v. Kazena*, 11 M. J. 28 (C. M. A. 1981), most courts have viewed *Cooper* as an all or nothing proposition. This has resulted in either total acceptance or total rejection of the constitutional analysis of *Cooper*. Those rejecting *Cooper* include, *People v. Barnett*, 170 Cal. Rptr. 255 (App. 1981); *State v. Wheeler*, 631 P.2d 376 (Wash. 1981); *State v. Collins*, 265 S.E.2d 172 (N.C. 1980); *State v. Beckes*, 300 N.W.2d 871 (Wis.App. 1980); *State v. Collins*, 260 S.E.2d 650 (N.C.App. 1979) and *State v. Ed-*

wards, 279 N.W.2d 9 (Iowa 1979).

Those cases or opinions following *Cooper* include, in addition to the Fourth Circuit cases, *State v. Johnson*, 596 P.2d 308 (Wash.App. 1979); *Comm. of Pennsylvania v. Klobuchir*, 405 A.2d 881 (Penn. 1979) (Opinion of three justices for an equally divided court); *Bullock v. State*, 397 N.E. 2d 310 (Ind. 1979) (Shields, J., dissenting). Additionally, a number of courts have cited *Cooper* approvingly. *See United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981); *Commonwealth v. Smith*, 427 N.E. 2d 739 (Mass. 1981) (partially approving of *Cooper*); *People v. Ferguson*, 413 N.E. 2d 135 (Ill. App. 1980); *Turner v. Fair*, 476 F. Supp. 874 (D. Mass. 1979); *Bush v. United States*, 473 F. Supp. 715 (E. D. Penn. 1979); and *State v. Nall*, 379 So.2d 731 (La. 1980) (Dennis J., concurring).

Given this extreme confusion and rampant conflict over whether or not a constitutional right exists under the instant circumstances this case merits certiorari consistent with this court's rules. *See* Supreme Court Rules, Rule 17(A) (B) & (C).

C. The Louisiana Supreme Court Misapplied The Fundamental Fairness Test By Refusing Petitioner's Motion to Quash.

The Louisiana Supreme Court failed to specify clearly the basis for its holding. It cited its earlier discussion of plea bargains in *State v. Nall*, 379 So.2d 731 (La. 1980) in which the majority opinion analyzed the case under principles of the Louisiana Civil Code law of obligation (contracts). The court admitted that *Nall* contained a concurrence by Justice Dennis wherein he articulated the view that the case should have turned upon constitutional principles as discussed in *Cooper*. Specifically, Justice Dennis said that he was "troubled by the [majority] opinion's *failure to analyze the case*

in any light other than contract law". Id. at 734 (emphasis added). 1/

Yet, the opinion below says of *Nall* that it does not "[reveal] any real difference of opinion among the members of this court on this point". *State v. Caminita,* No. 81-KA-1940, slip opinion at 5 (March 1, 1982). Furthermore, the court felt that "Justice Dennis' concurrence merely points up what is implicit in the majority opinion, that the traditional law of contracts guides educated expectations of fairness in any negotiation and can be a useful analogy in weighing claims of denial of due process in plea negotiations." *Id.* It is difficult to accept this conclusion when the language of *Nall,* and Justice Dennis' concurrence make it impossible to find an implicit recognition of the appropriate consitutional analysis by the majority.

Moreover, a careful reading of the opinion below discloses an uncertainty of analysis. At one point the opinion affirms the lower court because there was no "deterimental reliance". *Id.* at 4. Then later in the opinion the court seems to apply the "fairness" reasoning of *Cooper* while specifically rejecting the *Cooper* rationale. After a mix of contract and constitutional language the court concludes: "This is not enough to render the proceedings unconstitutionally unfair". *Id.* at 6.

It is submitted that such a case should be assessed in clear constitutional terms, *Santobello v. New York,* 404 U.S. 257 (1971); *Cooper v. United States,* 594 F.2d 12 (4th Cir. 1979), and that under that analysis more careful attention is owed the question of fairness than is given by

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1/ Justice Dennis did not take part in the instant case because the Louisiana Supreme Court was in the process of using rotating ad hoc Judtices, three of whom participated in this case.

the court below.

The error of analysis emanates from the Louisiana courts's narrow, and now antiquated definition of fairness: "But the real question is whether Ronald Caminita has been dealt with in a manner so fundamentally unfair that it shocks the (judicial) conscience". *State v. Caminita, supra,* at 5. Professor Tribe has aptly described the evolution of this test into its present form:

> The earliest methods used by the court to determine the required form of procedural due process involved reference to natural law. Later, ideas of "conventional morality" or notions of what has historically seemed "fair and right and just" were at the root of the selection of procedures. Although "a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process", overtly utilitarian interest-balancing has come to play a predominant role only in recent years. L. Tribe, AMERICAN CONSTITUTIONAL LAW 539–40 (1978). *See also, Board of Regents v. Roth,* 408 U.S. 465 (1972).

It is this failure to balance the harm to petitioner, caused by prosecutorial caprice, against any burdens to the government, which fatally flaws the Louisiana courts determination that no constitutional violation has occurred. Such a balance was required by *Cooper* and, as the Louisiana Supreme Court notes, *Cooper* involved "very similar facts". On those "very similar facts" the *Cooper* court, on balance, protected the criminal defendant, but the Louisiana court's conscience was not shocked. This Court should declare who is right.

II. The Ruling Below Conflicts With Important Sixth Amendment Rights Concerning Effective Assistance Of Counsel Previously Articulated By This Court And Other Lower Courts.

Petitioner also asserts that the "breached" plea agreement implicates important Sixth Amendment rights in that the lawyer-client relationship is largely dependent upon the client's trust in his attorney. That trust is destroyed when his attorney communicates plea offers that are subsequently and mysteriously not honored. This concern was prominent in the reasoning of *Cooper v. United States*, 594 F.2d 12 (1979), but completely ignored by the Louisiana Supreme Court despite the fact that the argument was made to them in petitioner's appellate brief.

Cooper rested heavily upon the Sixth Amendment. In fact, *Cooper* held that the fairness argument, *supra*, was "too plain to require discussion". *Id.* at 18. Consequently, virtually all of *Cooper's* constitutional analysis was of the Sixth Amendment component.

> Because prosecutors are required to conduct plea negotiations through defense counsel, the government's position and communications in plea discussions are necessarily mediated to defendant through his counsel. (Citations omitted). For this reason, not only the credit and integrity of the government but those of his counsel are involved in a defendant's perception of the process. *Id.* at 18.

The court went on to conclude that:

> To the extent that the government attempts through defendant's counsel to change or

> retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas. *Id.* at 18–19.

Cooper's holding is buttressed by similar reasoning of this Court, as in *Brewer v. Williams*, 430 U.S. 387 (1977). Most helpful is Mr. Justice Stevens' concurrence:

> At this stage [custodial interrogation of a defendant] - - as in countless others in which the law profoundly affects the life of an individual - - the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise [that interrogation would not take place in counsel's absence] to [defendant's] lawyer. *Id.* at 18.

By completely ignoring this issue the lower court has not given petitioner a full hearing on his important Sixth Amendment rights.

B. The Ruling Below Conflicts With Decisions Of Other Federal And State Courts And A Determination By This Court Is Necessary To Insure Uniformity On This Important Constitutional Issue.

While not all courts that have addressed *Cooper* have considered the Sixth Amendment question those that have disagree. Most important, however, is that the Fourth Circuit in reaffirming *Cooper* has attached even greater emphasis to the Sixth Amendment component. In *United States v. McIntosh*, 612 F.2d 835 (4th Cir. 1979), the court emphasized:

> Where, such as in *Cooper*, some technical rule works directly to impair a defendant's personal acceptance of an offer and deny a substantial right such as effective assistance of counsel, we will distinguish the application of such rules to the facts before us. *Id.* at 837.

Government of Virgin Islands v. Scotland, 614 F.2d 360 (3rd Cir. 1980) is an example of those cases rejecting the Sixth Amendment argument.

These cases represent well the conflict and confusion on this important constitutional issue. In order to avoid further confusion, and in order to guide lower courts, and in order to achieve uniformity this Court should grant plaintiff's petition consistent with Rule 17.

C. The Louisiana Supreme Court Failed To Apply The Appropriate Sixth Amendment Test In Deciding Whether To Grant Petitioner's Motion To Quash.

Indeed, little need be said on this point. Simply put, petitioner argued the Sixth Amendment issue to the Louisiana Supreme Court; *Cooper* rested heavily upon it, and yet the Louisiana court never mentioned it. Petitioner now asserts that he was deprived of the protection of this important determination by the court below. Furthermore, petitioner avers that the issue raised by this case cannot be and was not fully adjudicated since the Sixth Amendment argument is indispensable to a full constitutional analysis, and would be an independent basis for granting petitioner's motion to quash. As it is, petitioner has had only half of his pertinent constitutional rights adjudicated by the courts below.

CONCLUSION

Petitioner has been denied his due process right to fundamental fairness, defined according to the appropriate balancing of interests, and his Sixth Amendment rights by having his confidence and trust in his lawyer damaged by the prosecutor's whim in not honoring a plea agreement made by one with authority to do so.

Because serious constitutional rights are implicated in this case, and because the federal circuits and states are in hopeless conflict on this point petitioner prays that this Court grant his petition for certiorari.

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondent this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

D.A. Office of Orleans Parish,
State of Louisiana
619 South White Street
New Orleans, Louisiana 70119

Frank J. Uddo m.m.s.
FRANK J. UDDO

DATED June 4, 1981.

APPENDIX A–1

SUPREME COURT OF LOUISIANA
OFFICE OF THE CLERK
301 Loyola Ave.
New Orleans, Louisiana 70112

Dear Counsel:

Attached you will find a copy of the opinion in a case in which you are counsel. The judgment in this case will become final at the expiration of fourteen (14) days from the date appearing on the first page of the opinion unless an application for rehearing is filed within the delay provided and in conformity with the provisions of Rule IX of the Supreme Court, as revised and amended.

Sincerely yours,

Frans J. Labranche, Jr.
Clerk of Court

SUPREME COURT OF LOUISIANA

NO. 81-KA-1940

STATE OF LOUISIANA
V.
RONALD CAMINITA

Appeal from the Criminal District Court,
Parish of Orleans,
Honorable Rudolph Becker, III, Judge

March 1, 1982

SAVOIE: JUSTICE AD HOC*

On October 26, 1979, defendant was charged by bill of information with the armed robbery of a Ground Pati Restaurant employee in New Orleans. Subsequently, defendant entered a plea of not guilty to that charge. Two motions to suppress were filed prior to trial by defendant's counsel. A motion to suppress the evidence was denied by the trial court on January 25, 1980. The motion to suppress defendant's confession was taken under advisement and granted on January 29, 1980.

Pursuant to an alleged plea-barain, defendant appeared before the court on March 6, 1980, withdrew his former plea of not guilty and tendered a plea of guilty to simple robbery. The State objected to this plea as unacceptable. Immediately thereafter, defendant filed a motion to quash

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* Judges Shortess, Carter and Savoie of the Court of Appeal, First Circuit, participated in this decision as associate justices ad hoc, joined by Chief Justice Dixon, joined by Associate Justice Calogero, Marcus and Dennis.

the bill of information based on the state's alleged non-compliance with their previous plea-bargain agreement. The trial court denied this motion despite defendant's objection. Defense counsel notified the trial judge of his intention to take writs to this Court. A thrity-minute delay was given to defendant to attempt this application for writs and a stay order. The application was denied by this Court. The trial judge continued the trial date and set it for March 11, 1980. Trial began on that date and resulted in a jury verdict of guilty as charged. Subsequently, defendant filed a motion for a new trial which was denied by the trial court on June 13, 1980. On that same date, the trial court sentenced defendant to a term of five (5) years imprisonment at hard labor.

The facts of this case show that on October 23, 1979, at approximately 2:30 A. M., an employee of the Ground Pati Restaurant opened the locked rear door of the building to take out the trash. As he was walking back to the building, he heard noises in the hedges. When he looked in that direction, two boys armed with a knife and a gun rushed at him and ordered him to open the door. Since the door was locked from the inside, the employee had to knock on the door to get the manager, Jerry Roszezynialski, to open it. When Mr. Roszezynialski opened the door, all three persons entered the restaurant. The two armed robbers put the employee, Mr. Minor, in the cooler. Holding a gun on Mr. Roszezynialski, they ordered him to open the safe. After the safe was opened, one boy grabbed a female employee's purse and stuffed the money into it. With this accomplished, the robbers placed Mr. Roszeznialski in the cooler and fled.

While all of this was happening, a young female employee of the restaurant ran out of the front door and across the street to the Tastee Donut Shop where two policemen were sitting in their unit. She informed them that "Ronnie was

robbing the Ground Pati". When the officers arrived on the scene, the perpetrators had fled. On the ground in the rear of the building they found two stocking masks worn by the robbers and several coins taken from the restaurant.

The perpetrators were described by the witnesses as one black youth and one white youth, both wearing stocking masks. The young white man was described as 5' 7" or 5' 8", stocky build, wearing white bluejean pants and a yellow shirt. Katheryn Alderman, the female employee who notified the police officers, testified that she recognized the white youth as defendant, Ronald Caminita, an ex-employee of the restaurant. Another employee, Peggy Austin, also recognized defendant as one of the perpetrators.

Subsequently, defendant was arrested and charged with armed robbery.

The defendant appeals his conviction on two assignments of error:

1. The trial court erred in failing to grant the defense's motion to quash on the grounds that the State had failed to honor a plea-bargain agreement.

2. The verdict was contrary to the law and the evidence.

ASSIGNMENT OF ERROR NO. 1

The trial court erred in failing to grant the defense's motion to quash on the grounds that the State had failed to honor a plea-bargain agreement.

Soon after learning of the arrest of Caminita on a charge of armed robbery, and after being retained by the family as defense counsel, attorney Frank Uddo began making energetic efforts to persuade the Orleans Parish District Attorney's office to permit his client to enter a plea of guilty in return

for concessions on the eventual sentence. He spoke to at least three attorneys employed by the District Attorney's office, including District Attorney Harry Connick. The parties here give radically inconsistent accounts of these conversations. Mr. Uddo says that a conversation between himself and Chief of Trials, Joseph Meyer, which took place during a chance meeting in a restaurant, ended with a handshake between the two, confirming Meyer's promise to accept a guilty plea to simple (rather than "armed") robbery, which would carry a relatively short jail sentence, that could be served locally rather than at the State Penitentiary. Uddo says that in his earlier conversation with Mr. Connick, Connick had said that he would make no deal on the case since it was not his direct responsibility, but that he would support whatever decision was made by his subordinates. Connick maintains that he told Uddo no deal was possible at all.

Chief of Trials, Meyer, denies promising to reduce the charge against Caminita and complains, too, that Mr. Uddo deceived him by saying that such a deal would be acceptable to District Attorney, Connick.

At any rate, during a telephone conversation next morning between Meyer and Uddo, Uddo was apprised that Meyer would not reduce the charges against Caminita. Uddo asserted Caminita's right to specific performance of the plea-bargain before the trial court, but, after hearing evidence, the trial judge held that whether or not the elements of a binding contract, under the civil law, were present, the District Attorney's office was free to withdraw its promise so long as the defendant had not suffered prejudice to his substantial rights by reliance on the promise. Finding no detrimental reliance, the court refused to compel adherence to the alleged agreement. We think the ruling was correct.

This is not the first time that this court has been presented

with an insistence by a criminal defendant on the right to specific performance of a plea bargain agreement. In State v. Nall, 379 So.2d 731 (La. 1980), the prosecuting attorney promised to reduce the charges against an accused in return for the accused's testimony against his co-defendant. However, the statement given by the accused in fulfillment of his part of the bargain was completely different from what the prosecutor had been led to expect, so the prosecutor refused to be bound by his promise. Justice Blanche, writing for the majority of this court, analyzed the case under principles of the civil law of obligations, finding the plea-bargain agreement void for lack of cause on account of the defendant's misrepresentation of what his testimony would be. Justice Dennis, concurring, stated that the case turned on the constitutional guarantee of fundamental fairness contained in the Due Process Clause of the 14th amendment, and warned against excessive attention to the niceties of contract law in this context, citing *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979).

We do not read Nall as revealing any real difference of opinion among the members of this court on this point. Justice Dennis' concurrence merely points up what is implicit in the majority opinion, that the traditional law of contracts guides educated expectations of fairness in any negotiation and can be useful by analogy in weighing claims of denial of due process in plea negotiations. Certainly, if we confined ourselves to contract principles in this case, we might deny enforcement of the alleged agreement on the grounds that a plea bargain is a type of "Transaction and Compromise" which our Civil Code requires to be in writing; CC art. 3071.

But the real question is whether Ronald Caminita has been dealt with in a manner so fundamentally unfair that it "shocks the (judicial) conscience". For purposes of this analysis, we take the defendant's version of the facts as true,

since the trial judge made no fact-findings but rather found as a matter of law that the defense was not entitled to enforce the agreement even on the supposition that a promise was made.

The United States Fourth Circuit Court of Appeal has held on very similar facts, in the *Cooper* case, cited above, that the government cannot withdraw its consent to a plea-bargain, once made, when a higher-up in the prosecutor's office disagrees with the judgment of the attorney who struck the deal. *Cooper* is the only case in any jurisdiction to so hold and we reject its rationale. Absent any showing of detrimental reliance prejudicial to the substantial rights of the accused, or evidence of devious practice by the government such as bad-faith negotiation designed to psychologically probe the defense or gain some other improper advantage, the government remains free to withdraw from a plea agreement up to the time the plea is entered. The only detriment claimed by the defense here is that Mr. Caminita's hopes were raised when he was informed of the unsuccessful plea negotiation, then dashed when he was informed that the District Attorney had allegedly over-ruled his subordinate and repudiated the deal.

This is not enough to render the proceedings unconstitutionally unfair. We approve the reasoning of Judge Everett in U.S. V. Kazena, 11 M. J. Reporter 28 (Military App. 1081):

> "When an accused has demonstrated detrimental reliance on a plea-bargain, for example, by failure to call witnesses as to guilt or innocence who might otherwise have been available, I would enforce the plea-bargain. Virgin Islands v. Scotland, (cite). Conceivably, some other situations will reveal such 'unfairness' on the part of

the convening authority in connection with a plea-bargain that performance by the Government should also be compelled. Cf. Cooper v. United States, (cite) In the case at bar, there is no indication of detrimental reliance by the appellant, nor of unfairness on the convening authority's part. Therefore, despite the absence from the pre-trial agreement of any provision purporting to allow the convening authority to withdraw from the agreement, he was free to do so until the plea of guilty had been accepted."

ASSIGNMENT OF ERROR NO. 2

The verdict was contrary to the law and the evidence.

Caminita was convicted of holding up a restaurant at which he had previously been employed. He wore a nylon stocking over his head during the commission of the crime but two waitresses who had been employed along with him testified positively that they recognized him instantly and had no doubt at all that he was the robber.

From the record, it is apparent that the State presented adequate evidence by which the jury could find the defendant guilty beyond a reasonable doubt.

This Court's review of a trial court's denial of a new trial motion based on the assertion that the verdict is contrary to the law and the evidence is limited to the question of whether the trial judge has properly exercised his wide discretion. La. C. Cr.P. Art. 851; State v. Turner, 365 So.2d 1352, 1355 (La. 1978). It does not appear that the trial judge in this case violated that discretion.

For the above and foregoing reasons, the conviction and

sentence are affirmed.

AFFIRMED.

APPENDIX A–2

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

RONALD CAMINITA

NUMBER 272-902 "E"

Ruling of Judge Randolph F. Becker, III, as excerpted from pages 44–51 of the Transcript of proceedings held in the above numbered and entitled matter on March 6, 1980, the Honorable Rudolph F. Becker, III, Judge, presiding.

[44] address a point testified to by the movers.

BY THE DEFENSE:

Of course, in response to that, Your Honor - - the only response I have, Your Honor, is that what was brought up - - and I'm certain what Mr. Connick will try to refute - - was brought up originally on direct and they had an opportunity to put him on. I think it's too late and the door's shut. Again, I'd note my objection.

BY THE STATE:

Your Honor, the State has nothing else.

BY THE COURT:

Alright. Your objection's overruled. Gentlemen, is the matter submitted or is there any argument?

BY THE DEFENSE:

Your Honor, I'll submit the matter on the testimony before the court.

BY THE STATE:

Submitted.

BY THE COURT:

Mr. Garcia, the only thing I can say with regard to the conversation - - whether it was a misunderstanding or whether a deal was actually culminated with regard to the incident at the steak place - - Chris's Steak House - - I don't know of any law that would allow a superior not to cancel - - let's put it this way - - a superior not [45] to be - - if a deal had been made and I'm not going into whether one had been made or not - - I have no doubt that counsel believed that a deal was made - - whether it had actually been made or whether it was only his thought that a deal had been made - - but I know of no law that does not allow a superior or even the district attorney of the Parish of Orleans, or any other parish, to withdraw any plea bargain agreement prior to the culmination of the plea bargain agreement. It's entirely, as I understand the law, within his the discretion and, of course, if a plea bargain had been made, I know of no law that - - by a subordinate - - that would not allow the district attorney for Orleans Parish or his first assistant to set aside that agreement and reinstitute the proceedings.

BY THE DEFENSE:

Your Honor, If I may, there are cases that specifically say that when the district attorney definitely imparts

the fact that he has the authority to enter into a plea bargain and a plea bargain is actually arrived at, then that is binding. The procedure through which the redress is obtained is through a motion to quash. Now, unfortunately, - - now, I've handled one of these before and [46] I won this point once before and, unfortunately I don't have the law with me at this moment.

BY THE COURT:

But the district attorney did not enter into a plea bargain.

BY THE DEFENSE:

Your Honor, I think that the facts are pretty clear that Mr. Myers did, number one, hold himself out to have the authority to enter into the deal and, of course, it depends on how you weigh the testimony. I think it's been adequately illustrated that the idea or the whole concept of a deal was made. That was the idea. There was a negotiation going on that culminated in a deal and, like I said, you've got to weigh the facts, but I believe that it shows that. Now, if that is the case, the deal that was made is binding. I hate to use an analogy to a civil situation, but you have an offer and acceptance - - you have a contract - - and that's what we had here. We had a negotiation. We had a culmination with a deal. We all walked away with the intention of pleading to a simple robbery and I don't think anybody can tell me that when we walked away from that table that night that there was anything different in anybody's mind. Specifically, the terms - - I don't care if [47] he serves fifteen days - - no, we've got to get a year - - well, they said, Just so long as we have a plea with jail time, fine. We've got a deal. Shake hands and walk away from the table. Good. I'll buy you all a drink. We've got a deal. I walked away. As a

matter of fact, Mr. Myers and the lady left and Mr. Plavnicky was left at the table after that and I had even invited him to come to my table after that time to talk about times for setting up the plea. And there is law and I feel almost naked standing before the court without having that law in my hand right now, but there's a law to that effect.

BY THE STATE:

Your Honor, I would point out that I think Mr. Uddo is certainly correct that there is law in the area of plea bargaining, but the . . .

BY THE COURT:

Of course. That's not my point.

BY THE STATE:

What I was going to say, Your Honor - - I don't have the name of the case right now, but there's a case in the January slips which discusses this very issue as to what Mr. Uddo has said - - the contractual obligation. They even look to the Civil Code, but the cases that do exist in the law, as I appreciate [48] the law, Your Honor, involve situations where a case has been reduced in return for a witness's testimony for the State or something like this and that's not the nature of this - - if there was, as you say, an agreement, which the State, of course, denies. . .

BY THE COURT:

Certainly, there's a plea bargain agreement, if it's entered into validly - - that plea bargain agreement must be kept if the consideration is fulfilled, to-wit, a defendant

testifies against his co-defendant for a plea to a reduced charge and the district attorney does not reduce the plea until after the testimony and then he says, Ha, ha. too late. We're not going to reduce your plea. They're bound by that. But that's not what happened here and that's my point with regard to the law. I don't believe there is any law that says the district attorney or a superior cannot cancel an agreement made with a subordinate.

BY THE DEFENSE:

Your Honor, if I may, in a case of this nature when you get into an active negotiation for plea bargaining and all the parties have the mental assent of having the plea bargain arrived at and, specifically, defense [49] counsel has the idea that he has a plea bargain, you then abandon the necessity of trying to put together a case. The defense will suffer as a result of it. In any case of this nature when a deal is struck the lawyer has to feel that by and large his job is done and I will be honest with you - - that's the feeling that I had - - that's the feeling that he had and that's what we came into court today specifically with the idea of pleading to a lesser offense. We felt that we had the right to the plea, through this argument, regardless, and I feel that the case that I did this on previously I can remember the d. a. was Clyde Merritt in Judge Oser's court and we brought it - - I've been racking my brain for the name of the defendant in the case, but I can't come up with it. The situation was we had discussed a plea bargain just like this. The judge was aware of the fact that we had discussed a plea bargain, although he did not participate, nor did he make any commitments about anything and at the last minute the bargain was reduced - - I don't remember exactly what the situation was - - but at that moment Judge Oser allowed him to proceed

with the case. I took a writ to the Supreme Court [50] and the Supreme Court upheld it. It said a bargain was struck and it was improper to proceed after that point. One of the reasons that I got messed up in that case was because I didn't file my motion to quash timely, but in this case the motion to quash is properly filed and it is the proper vehicle through which this is to be considered.

BY THE COURT:

Mr. Uddo, I have no doubt in my mind - - in fact, I've sent you down with Mr. Plavnicky to speak to Mr. Connick or Mr. Capitelli on several occasions. I know you've been attempting a plea bargain with the district attorney, I'm faced really with two things here, as I see it. One, whether a plea bargain agreement was made or whether discussion of a plea bargain agreement and you, in your mind, felt that a deal had been consummated or, two, whether if a plea bargain agreement had been made by a subordinate - - whether that plea bargain agreement could be cancelled by a superior. Now, I've got Mr. Capitelli's testimony that he at one point - - at least at one point - - had denied the reduction to you and then your testimony with regard to your speaking with Mr. Connick that it was up to the [51] trial assistant or whatever and further testimony from Mr. Myers that since you had spoken to Mr. Connick that he would have to check with Mr. Connick before he could actually consummate, I take it, the plea bargain agreement and as a result it was not consummated. My point being that I really feel that if a subordinate had made a plea bargain agreement and a superior - - more particularly, the district attorney - - could cancel that plea bargain agreement without any detriment to the defendant. I'll be glad to take a look at your case. Mr. Chester, I think the case you're speak-

ing of deals with more or less a contract.

BY THE STATE:

Correct. One was a plea to manslaughter in return for the testimony at trial.

BY THE COURT:

I'm well aware of the situation, but that's not the situation here. I'll take the matter under advisement, if you desire, Mr. Uddo, for fifteen minutes. You can use the district attorney's library downstairs. I'll be truthful with you - - I'm really of the opinion that a superior can cancel a plea bargain agreement.

BY THE DEFENSE:

Fifteen minutes would put us under a terrific

NO. 81-2273

Office-Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RONALD CAMINITA,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 81-2273

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RONALD CAMINITA,

Petitioner

versus

STATE OF LOUISIANA,

Respondent

On Application For Writ of Certiorari To
The United States Court of Appeals For
The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 21, 1979, the petitioner, Ronald Caminita, was arrested and charged with armed robbery, a violation of La. R. S. 14:64, and on October 26, 1979, he was charged by bill of information with this same offense. Shortly thereafter, the petitioner's attorney, Mr. Frank Uddo, began making energetic efforts to persuade the District Attorney's Office to reduce this charge to simple robbery, a violation of La. R. S. 14:65. These efforts included discussions with both the District Attorney and the First Assistant District

Attorney and all were unsuccessful.

On the night of February 15, 1980, two weeks before the scheduled trial date, Mr. Uddo happened upon both the Assistant District Attorney handling the case and his immediate supervisor at a local restaurant. Although the parties involved give differing accounts as to what transpired that night, it is clear that the case was discussed and Mr. Uddo apparently left with the impression that the State would accept a plea to simple robbery. The following morning, however, Mr. Uddo was informed by the District Attorney's Office that a plea to simple robbery was not acceptable.

Mr. Uddo, nonetheless, persisted in his attempt to have his client plead guilty to the lesser charge and on the day of trial, March 6, 1980, tendered a plea of guilty to simple robbery. This was objected to by the State and the petitioner's subsequent motion to quash the bill of information based on the State's alleged non-compliance with their previous plea-bargain agreement was denied. The petitioner was granted a continuance of the trial and on March 11, 1980 the petitioner was tried before a twelve member jury and found guilty of armed robbery. Petitioner was sentenced to a term of five (5) years imprisonment at hard labor.

Petitioner appealed his conviction and sentence to the Louisiana Supreme Court which affirmed both on March 1, 1982 and a rehearing was denied.

ARGUMENT

The gist of petitioner's argument is that if, in the course of plea negotiations, the State consents to accept a certain plea, it is irrevocably bound to that decision regardless of whether or not the defendant has done anything in reliance upon it. In other words, the defendant may withdraw from a plea bargain at any time until the plea is entered yet the State may not. This argument is premised on the belief that a defendant has a constitutional right to specific performance of unconsummated plea bargains. Although this novel argument has been accepted by the Fourth Circuit Court of Appeals in *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), no other circuit has adopted this rationale. The Louisiana Supreme Court was correct in rejecting this argument.

In rejecting petitioner's request for specific performance of the prosecutor's alleged agreement to accept a plea to simple robbery, the Louisiana Supreme Court stated that:

> "Absent any showing of detrimental reliance prejudicial to the substantial rights of the accused, or evidence of devious practice by the government such as bad-faith negotiation designed to psychologically probe the defense or gain some other improper advantage, the government remains free to withdraw from a plea agreement up to the time the plea is entered."

This holding is in accord with this Court's seminal case on plea bargaining, *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 427 (1971), in which this Court recognized the basic estoppel principle that when a defendant pleads guilty in reliance on an agreement with the

prosecutor, that promise must be fulfilled. Crucial to that principle is that the defendant has suffered some sort of detrimental reliance, specifically in that case, a guilty plea. "A constant factor is that when a *plea* rests in any significant degree on a promise or agreement of the prosecution, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 264, 92 S. Ct. at 499, 30 L. Ed. at 431.

As the broad language in the Louisiana Supreme Court opinion suggests, *Santobello* could conceivably be extended to encompass a situation where the defendant has not yet entered a plea but has relied on the bargain to such an extent that substantial rights have been prejudiced. Envisioned, for example, is the situation where a defendant, relying on a plea proposal, fails to call witnesses who would otherwise be available and is then forced to trial without them. *United States v. Kagema*, 11 M. J. Reporter 28 (Military App. 1981). Again, what is important is that the defendant has done or refrained from doing something in reliance on the prosecutor's offer and has subsequently been hurt by this.

In the present case the petitioner has not, nor could, allege any detrimental reliance on the District Attorney's alleged agreement to accept his plea to simple robbery. The damage envisioned in *Santobello*, the guilty plea, was not suffered nor was there any other type of detrimental reliance. Regardless of what transpired on the night of February 25, petitioner's attorney was informed the next day, well in advance of the trial date, that no deal was available. When, on the day of trial, petitioner's motion to quash was denied, petitioner was granted a continuance of his trial. Therefore the petitioner cannot argue that due to his reliance on the government's plea offer he was forced to proceed to trial unprepared.

Petitioner can complain of no harm whatsoever, except perhaps, that his hopes were dashed when the prosecutor refused to accept his plea and those are hardly the the substantial rights meant to be protected by the Constitution. After learning of the prosecutor's refusal to accept his plea to simple robbery, petitioner was in the same exact position as he was before any negotiating began. This Court has specifically stated that a defendant has no right to plea bargain, therefore petitioner was not deprived of any right either before or after the plea bargain fell through. *Weatherford v. Bursey*, 429 U.S. 547, at 361, 97 S. Ct. 837 at 846, 51 L.Ed.2d 30 at 39 (1977). Petitioner's constitutional right to trial by jury was always available and was never impaired. "It is a novel argument that constitutional rights are infringed by trying a defendant rather than accept his plea of guilty." 429 U.S. at 561, 97 S. Ct. at 846, 40 L.Ed. 2d at 39.

The petitioner also contends that the State's retraction of the plea proposal caused the defendant to lose confidence in his counsel's capability, such that the defendant's Sixth Amendment right to effective counsel was violated. This argument is ridiculous for the appropriate focus for determining whether the right to effective counsel has been violated is on defense counsel and his performance rather than on defendant's perception of defense counsel. *Government of Virgin Islands v. Scotland*, 614 F.2d 360 at 363 (3rd Cir. 1980). The incongruous result of petitioner's claim would be that any time a defendant was disappointed in the result of his counsel's legitimate endeavors on his behalf he could claim ineffective assistance of counsel. It may also be noted that although the petitioner repeatedly claims that the Louisiana Supreme Court ignored this argument in their holding, the petitioner did not raise it until his petition for rehearing.

CONCLUSION

The ruling of the Louisiana Supreme Court was correct and in accord with the principles set forth by this Court. These principles are well established and there is no conflict of law that is in need of resolution. Mr. Caminita's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

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CERTIFICATE OF SERVICE

I certify that a copy of this Opposition To Application For Writ of Certiorari has been sent to:

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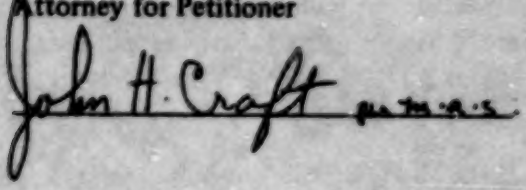

New Orleans, Louisiana, this

1st day of October, 1982.